

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
7 WORLD TRADE CENTER, L.P.	:	DETERMINATION
	:	DTA NO. 817373
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period December 1, 1994 through November 24,	:	
1997.	:	

Petitioner, 7 World Trade Center, L.P., 521 Fifth Avenue, New York, New York 10175, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1994 through November 24, 1997.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on August 8, 2000 at 10:30 A.M. and continued to conclusion at the same location on September 21, 2000, with all briefs to be submitted by April 26, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared by Cunningham & Cunningham, LLP (Gerard W. Cunningham, Esq., and Brian G. Cunningham, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Cynthia E. McDonough, Esq., of counsel).

ISSUES

I. Whether petitioner has established its entitlement to a refund of sales and use taxes paid on its purchases from 20 various vendors during the post-construction, operational phase of its long-term lease of real property owned by the Port Authority, on the basis that (i) it made such

purchases as an agent of the Port Authority, an exempt organization, or (ii) pursuant to Tax Law § 1115(a)(15) and (16), because such purchases consisted of tangible personal property sold to a contractor for use in erecting a structure or a building of an exempt organization, or adding to, altering or improving or maintaining, servicing or repairing the real property of an exempt organization, or (iii) such purchases constituted capital improvements.

II. Whether, in the alternative, petitioner has established its entitlement to a refund of sales and use taxes paid on its purchases of services performed on the leased space of various governmental tenants.

FINDINGS OF FACT

1. Early in 1980, the Port Authority of New York and New Jersey (“Port Authority”) decided to expand the World Trade Center complex in lower Manhattan by adding an additional 40-story office building with approximately 2,000,000 square feet, to be known as 7 World Trade Center, on Vesey Street across from the main complex which contained the world famous twin towers. This additional building¹ would be developed and operated by Silverstein Properties, Inc., which created petitioner, 7 World Trade Center, L.P., for the purpose of carrying out, in the language of petitioner’s lease agreement with the Port Authority dated December 31, 1980 (“the lease agreement”), “the complete design, construction, equipping and operation” of 7 World Trade Center. Larry Silverstein, as president of petitioner’s general partner, Silverstein Development Corporation, executed the lease agreement on behalf of petitioner. The parent entity, Silverstein Properties, Inc., from its central location at 521 Fifth Avenue in midtown Manhattan managed approximately nine substantial commercial office buildings, including 7

¹ 7 World Trade Center, like the twin towers, would be destroyed as a result of the terrorist attack on September 11, 2001.

World Trade Center during the period at issue, on behalf of this related entity, Silverstein Development Corporation.

2. The lease agreement, consisting of 111 pages plus several additional schedules and exhibits, is a complex document which detailed the relationship between petitioner, as the lessee, and the Port Authority, as the lessor, in relevant part, as follows:

Section 4. Development and Construction of Tower Building

4.1 The Lessee at its cost and expense shall design, construct and equip on the premises . . . a Tower Building containing not less than one million rentable square feet of first-class office space. The Lessee shall expend for the initial cost of construction of the Tower Building . . . not less than [\$100,000,000.00].

4.9 Prior to entering into any Tower Building construction contract or contract for the installation of fixtures or equipment therein the Lessee shall submit to the Port Authority for its approval the name of the contractor² to whom it proposes to award any such contract, and if requested, the form of contract to be used by the Lessee The Port Authority shall have the right to disapprove any proposed contractor if in its opinion reasonably exercised the contractor or its proposed subcontractors lack the reputation, experience, personnel or resources to properly construct the Tower Building The Port Authority shall have no liability or obligation in connection with any proposed or actual construction or installation contract entered into or proposed by the Lessee, whether or not approved by the Port Authority and the Lessee hereby releases and discharges the Port Authority from liability or claim of damage for loss arising or alleged to arise out of the performance or nonperformance of construction work pursuant to contracts proposed or entered into between the Lessee and its contractor. Any warranties or guarantees contained in any contract entered into by the Lessee for performance of construction or installation work shall be for the benefit of the Port Authority as well as the Lessee and the contracts shall so provide.

4.10 All utilities and services (including but not limited to water, sewerage, electricity and steam) required for the performance of the construction work and the operation of the Tower Building shall be obtained by the Lessee . . . And the Port Authority shall not be required to bring any of the foregoing utilities or services within or without the premises.

² Petitioner retained Tishman Construction as general contractor for the construction of the office tower.

4.12 Legal title to the Tower Building construction, including improvements, appurtenances and fixtures shall vest in the Port Authority immediately upon erection or affixation of all or any part on or to the premises.

4.16 All construction and installation work which the Lessee shall do . . . shall be done strictly in accordance with the following:

4.16.1 The Lessee shall indemnify and hold harmless the Port Authority, its Commissioners, officers, agents and employees against . . . risks whether they arise from acts or omissions of the Lessee or the Port Authority or . . . third persons

4.16.1.3 [For third party claims or demands] Lessee shall indemnify the Port Authority . . . and shall reimburse the Port Authority for the Port Authority's costs or expenses including legal expenses incurred in connection with the defense of all such claims and demands.

4.16.2 The Lessee shall pay all claims lawfully made against it by its contractors, subcontractors or materialmen and workmen and all claims lawfully made against it by other third persons arising out of or in connection with or because of the performance of the construction work Nothing herein contained shall be deemed to constitute consent to the creation of any lien or claim against the premises nor to create any rights in said third persons against the Port Authority.

Section 6. *Law Compliance, Taxes and Excises*

6.6 The Lessee shall pay all taxes, licenses, certification, permit and examination fees, duties, excises and all other governmental charges of every character present and future . . . which may be assessed, levied, exacted or imposed on the Lessee's property, operations or occupancy hereunder or on any property whatsoever which may be received at the premises or on the rental or income therefrom

Section 12. *Maintenance, Repair and Rebuilding*

12.1 The Lessee shall, throughout the term of this Agreement assume the entire responsibility and shall relieve the Port Authority from all responsibility for all care, maintenance, repair and rebuilding whatsoever in the premises, whether such maintenance, repair or rebuilding be ordinary or extraordinary, partial or entire, foreseen or unforeseen, structural or otherwise

12.2 . . . Nothing herein contained shall be deemed to require the Port Authority to notify the Lessee of needed repairs or replacement of or required maintenance or preventive maintenance nor shall the Port Authority have any

liability or responsibility whatsoever to third persons in or on the premises and the Lessee shall be solely responsible for any failure to perform needed maintenance, repair or restoration, rebuilding or painting.

3. Although the record does not specify the exact date when the construction of 7 World Trade Center was completed, it appears to have been completed in the late 1980s. Consequently, the period at issue, December 1, 1994 through November 24, 1997, was clearly during the operational phase, and not the development or construction phase, of petitioner's lease with the Port Authority. This operational phase, under Section 2 of the lease, was specified to last for 39 years at which time petitioner's lease with the Port Authority would terminate.

4. During the operational phase, petitioner was obligated, under Section 5.2 of the lease, to pay to the Port Authority a basic annual rental equal to the greater of (i) \$150,000.00, or (2) \$6.75 multiplied by the number of occupied rentable square feet. In addition to the above amount, petitioner was also required to pay to the Port Authority during the operational phase "an annual percentage rental which shall equal forty per cent (40%) of the excess of the Net Cash Flow arising during each annual period" This lease term, "Net Cash Flow," was defined in Section 5.1 of the lease as "the excess of Gross Revenue over Gross Expenses for said annual period." "Gross Revenue" was defined by the lease in detail and expansively as follows:

[T]he total of all monies, revenues, receipts and income of every kind paid or payable to the Lessee or otherwise derived by the Lessee from or in connection with the operation of the Tower Building including but not limited to rentals, compensation, license or privilege fees or shares of income or revenue paid or payable to the Lessee from space tenants, licensees, concessionaires or others who occupy space or who conduct any business or perform any services in or from the Tower Building including proceeds of rent insurance . . . and monies or other compensation paid or payable to the Lessee arising out of the sale [of] merchandise or the rendition of services to space tenants, licensees, concessionaires and all monies paid or payable to the Lessee from the sale of equipment, supplies, products or other merchandise of any kind (whether by vending machine or otherwise)

The lease definition of “Gross Expenses” referenced the expenses listed on a detailed “Schedule E” annexed to the lease, which consisted of three pages of items “paid or incurred for the period subsequent to the close of the Development Period” including the following:

salaries of petitioner’s employees; petitioner’s basic annual rental paid to the Port Authority; payments for fuel and utilities required for the operation of the office building; insurance premiums; payments to third parties for ordinary maintenance and repair of the building including payments for any contract or cleaning maintenance; interest and amortization of petitioner’s leasehold mortgage, which covered petitioner’s initial cost to construct the building; and any expenditure “as would necessarily be incurred by the prudent operator of a first-class office building.”

5. During a period of just under three years, petitioner purchased approximately \$13,750,000.00 worth of services and materials on which it paid sales and use taxes of approximately \$1,100,000.00 in order to maintain, operate and improve the 2,000,000 square foot office building. By an application for credit or refund of sales and use taxes dated November 24, 1997, petitioner sought a refund of this \$1,100,000.00. The refund claim provided no details other than petitioner’s assertion of the following four bases for its claim:

1. Services and materials purchased in connection with the completion of capital improvement construction projects as defined in Tax Law Section 1101(b)(9);
2. Services and materials purchased in connection with the repair, improvement, alteration, maintenance, operation, rebuilding and care of 7WTC;
3. Tangible personal property used for erecting, maintaining, servicing or repairing real property, property or land of the Port Authority, a tax exempt organization, which became an integral component part of 7WTC (see Tax Law Sections 1115[a][15] and [16]); and
4. Services and materials incorporated into or used upon or within 7WTC which upon incorporation into or use upon or within 7WTC became the property of the Port Authority.

The instructions printed on the back of petitioner’s application for credit or refund of sales and use taxes included the following direction:

A contractor claiming credit or refund for tax paid on a purchase of tangible personal property (1) which became a physical component part of property upon

which a taxable service, such as a repair, was performed or (2) which was subsequently resold by way of a retail sale of such tangible personal property must submit a columnar worksheet indicating the following information for each transaction: date of sale, name of customer, locality, amount of invoice excluding sales tax, tax collected, cost of materials used, tax paid on materials which qualify for the credit or refund, and a description of these materials.

Petitioner provided little, if any, backup documentation for its refund claim.

6. The auditor who reviewed petitioner's claim dated November 24, 1997 determined that he needed copies of all of petitioner's invoices for the period of its refund claim. During a phone conversation on June 2, 1998, petitioner's representative agreed to the auditor's request that petitioner provide the invoices and that the representative would have them "sorted into categories, one for services and one for the items incorporated into the building." When the invoices were not provided by the promised mid-June 1998 date, the auditor sent a letter dated July 10, 1998 to petitioner's representative advising that he was "again requesting" the copies of invoices, and if they were not sent within 30 days of his letter, "the refund application will be denied."

7. By a letter dated August 14, 1998, the auditor approved a partial refund in the amount of \$35,672.56, a very small portion of petitioner's \$1,100,000.00 refund claim. The auditor provided the following explanation:

The amount of \$1,064,327.44 is being denied for the following reasons:

1. Of the \$1,100,000.00 requested, I have only received documentation for the sales tax paid on tangible personal property and capital improvements in the amount of \$88,755.11. Therefore, \$1,011,244.89, is being denied for lack of documentation.
2. The disallowed amount of \$1,011,244.89 is also being denied since the information received from your representative states that the tax was paid on the purchase of services used in the operation of 7 World Trade Center. There is no exemption allowed for your purchase of services since the only exemption

allowable is for tangible personal property incorporated into the building, which is owned by the Port Authority, and therefore exempt.

3. Of the \$88,755.11 in sales tax that was documented I am denying \$53,082.55 since that amount of sales tax was paid on taxable purchases, such as maintenance charges and supplies, which were not incorporated into the building. I have attached schedules showing the disallowed amounts for each vendor and the reasons for the denial.

The auditor attached two schedules to his letter. One listed 38 suppliers of tangible personal property “incorporated into structure.” The auditor allowed a refund of sales and use taxes of \$18,990.59 out of the total amount of tax shown paid on the invoices of \$27,468.67. He determined that tax was properly paid in the amount of \$8,478.08 and provided the following details concerning the taxable items included in the rejected invoices of 11 of the 38 suppliers:

Supplier	Amount of tax claimed refundable	Tax Refundable	Tax Not Refundable	Taxable items included in invoices
All City Paper	\$ 82.50		\$ 82.50	Hampers
Engineered Air Filters	3,207.07		3,207.07	Air filters
Forest Sign	1,429.56	\$ 934.22	495.34	Stanchion posts and ropes
Hi-Tech Metal	148.50		148.50	Chairs
Horticultural Creations	3,497.27		3,497.27	Plants, flowers
H O Penn Machinery	816.52	636.66	179.86	Preventative maintenance
Hudsa Paint	584.76	443.27	141.49	Painting supplies, brushes, rollers, etc.
J A Sexauer	859.30	855.69	3.61	Tools
Kove Brothers	970.96	961.45	9.51	Gas, Oxygen and aceteylene
M Zion Co. Inc	863.34	817.88	45.46	Duplicate keys, combination locks and locks for desks

WW Granger	1,090.85	423.38	667.47	Tools, soap, time cards, portable generator, flashlights, batteries, combination locks, ladders, room air conditioner, booster cables, saw blades
TOTAL OF TAX NOT REFUNDABLE			\$ 8,478.08	

The second schedule prepared by the auditor listed 21 suppliers of capital improvements and exempt services. The auditor allowed a refund of sales and use taxes of \$16,681.97 out of the total amount of tax shown paid on the invoices of \$61,286.44. He determined that tax was properly paid in the amount of \$44,604.47 and provided the following details concerning the rejected invoices of 7 of the 21 suppliers:

Supplier	Amount of tax claimed refundable	Tax refundable	Tax not refundable	Taxable items included in invoices
American Power	\$ 12,336.20		\$ 12,336.20	Maintenance, consulting service
Elgin Metal Maintenance	20,639.29	\$ 2,538.92	18,100.37	Repair, maintenance, cleaning
Johnson Controls	123.03		123.03	Charge for written proposal
Machal Service Systems	8.25		8.25	Training charge
Milo Kleinberg Design Assoc	4,546.67		4,546.67	Design work
Sheldon Electric	619.44	245.44	374.00	Testing, repair, maintenance
White Bear Co Inc	9,115.95		9,115.95	Repair and maintenance
Total of Tax Not Refundable			\$ 44,604.47	

8. By a Conciliation Order dated July 23, 1999, petitioner was allowed an additional refund of sales tax in the amount of \$20,556.91, which would equate to the conferee's considering purchases of approximately \$250,000.00 as not being subject to sales tax. According to the auditor, the additional purchases determined not to be subject to tax were represented by invoices of Horticultural Creations, Inc. for "the planting of trees and things of that nature" (tr., p. 69).

9. At the hearing in this matter, petitioner introduced into evidence invoices showing sales tax paid on its purchases from the following 20 suppliers,³ which form the basis of its claim for refund of sales tax in the additional amount of \$ 995,179.08, which remains at issue:

Name of supplier	Amount of tax claimed refundable
Coyne Electrical Contractors, Inc.	\$ 5,939.10
Elgin Metal and Marble	25,768.48
Elgin Metal and Marble (ice and snow removal)	3,190.28
Fire Service Inc.	22,914.28
MacKenzie Group Inc.	1,402.34
Otis Elevator Company	143,897.95
American Contracting Company	308.55
H.O. Penn Machinery Company, Inc.	1,128.87
Engineered Air Filters, Inc.	4,809.56
Henry Brothers Electronics	3,314.84
Kaback Enterprises, Inc.	4,461.51

³ Petitioner presented its claim with regard to purchases from Elgin Metal and Marble in two separate exhibits so that this supplier is shown twice in the above table. It also presented its claim with regard to purchases from Otis Elevator Company in two separate exhibits. However, the total of its claim for refund of sales tax paid to this company was combined for purposes of the above table. Consequently, although petitioner in its brief stated that it sought refund of sales tax paid on purchases from 22 various vendors, the correct number is 20.

Johnson Controls, Inc.	5,000.00
Reliance Electric Company	1,142.24
Remco Maintenance Corporation	24,873.98
White Bear Company	9,652.50
American Scaffold Parts	958.87
ABM Co.	43,657.88
Ogden Allied Services, Inc.	691,801.29
Sheldon Electric	441.59
Walsh Electrical Contracting	103.54
American Power Technologies	411.43
Total tax claimed refundable	\$995,179.08 ⁴

10. As noted in Finding of Fact “1”, petitioner’s parent entity, Silverstein Properties, Inc., managed approximately nine substantial commercial office buildings, including 7 World Trade Center during the period at issue, on behalf of petitioner’s other related entity, Silverstein Development Corporation. A review of the hundreds of checks introduced by petitioner to establish payment of the sales tax on invoices which it asserts were exempt from taxation shows that all payments were made on a checking account which this parent entity, Silverstein Properties, Inc., maintained with the Wall Street branch of The Bank of New York. The only indication that the parent’s check was on behalf of petitioner is the abbreviation “7WT”, which appears in parentheses on the face of each check. Further, the parent’s check included absolutely no mention or reference to the Port Authority.

⁴ At the hearing, petitioner withdrew its claim for refund of sales tax paid of \$154.68 on three invoices from Bailey-Fischer & Porter for the reading and servicing of steam meters, which tracked tenant usage of steam for heating purposes (tr., p. 226).

11. Petitioner presented the testimony of Walter James Weems, III, a management employee of Silverstein Properties, Inc. for approximately 20 years, who had been employed as the building manager of 7 World Trade Center. Based upon his personal knowledge of the goods and services purchased from the 20 suppliers as detailed in Finding of Fact “9”, the following factual findings may be made concerning the purchases which petitioner asserts were exempt from the imposition of sales tax and form the basis for its refund claim.

12. Approximately 70% of petitioner’s refund claim relates to its purchases from Ogden Allied Services, Inc. of so-called “general cleaning services.” Petitioner seeks a refund of sales tax paid of \$691,801.29 so that the purchases from Ogden Allied Services, Inc. amount to approximately \$8.6 million. These services were performed by this supplier in both tenant and public spaces. At the hearing, petitioner introduced into evidence an exhibit consisting of 278 pages of invoices and related documents showing its purchases from Ogden Allied Services, Inc. Petitioner was granted permission to provide an itemization of the particular purchases included in this exhibit which it still maintains were exempt from tax. It conceded at the hearing that some of the purchases from this supplier were properly subject to tax. By the submission of an affidavit of Clifford H. Schwartz, petitioner’s vice president and controller, purchases, on which sales tax totaling \$691,801.29 was paid, were itemized by reference to the specific page of this lengthy exhibit. The types of purchases from this supplier which petitioner still maintains were exempt from tax include the following representative invoices of Ogden Allied Services, Inc.:

Invoice Date	Specific Description of Goods and/or Services Performed on Invoice	Purchase Amount Shown on Invoice	Amount of Sales Tax Paid on Purchase Amount
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1/11/95	Additional window cleaning services for drops #8-11 and main lobby 72 hrs overtime X \$45.67 o/t hr window cleaning	\$3,288.24	\$271.28
1/12/95	Provide light maintenance services on 11/23/94, replace (8) Lutron hi lume dimmer ballast, 8 @ \$45.00/unit light fixture maintenance	3,600.00	297.00
12/06/94	General cleaning Lamping ⁵ Freight elevator operator Exterminating service Mechanical lift Scaffold maintenance SEC window cleaning EEOC window cleaning	215,987.21 2,814.20 12,705.71 572.38 1,466.93 1,400.00 162.92 84.27	None shown as paid
12/15/94	Services rendered on 11/11/94, installation service, light fixture maintenance	476.17	39.28
12/15/94	Services rendered on 10/7/94, supply and install 20 th floor "Hartford" 1 A21 100W and fixed socket light fixture maintenance	9.31	.77
12/28/94	Provide additional window cleaning services to assist Elgin, 48 hrs. (o/t) X \$45.67 hr window cleaning	2,192.16	180.85
2/14/95	Provided exterminating service on 12/30/94-exterminate for fungus knats	59.00	4.87
8/31/95	Services rendered on 8/24/95, purchased one "night eagle" 605 insect light for the loading dock area exterminating service	425.00	35.06

⁵ Lamping was described by Mr. Weems as replacing light bulbs in the public areas of 7 World Trade Center.

9/20/95	Provided additional services to clean main lobby on Sunday, 16 hrs o/t X \$54.59 hr.	873.44	72.06
3/20/95	Services rendered on 1/10/95, supply and install 3 MVR 250/c/v at \$87.05 each \$261.15; 2 lg porcelain sockets at \$6.60 each \$13.20; installation service \$684.13 less 35% discount on lamps (91.39), light fixture maintenance	867.09	71.53
5/26/95	Provided window cleaning services to assist local law inspection, 32 hrs (o/t) X \$37.34 hr o/t window cleaning	1,194.88	98.58
7/20/95	Window cleaners to polish stone drops #15 and #16, 12 hrs. o/t X \$47.95 hr	575.40	47.47
10/1/96	Services rendered on 8/15/96, clean fixtures under plaza, light fixture maintenance	194.99	16.09
3/5/97	Services rendered on 1/20/97 for labor, light fixture maintenance	194.96	16.08
4/29/97	Services rendered on 2/22/96, replace lights under plaza, re-billing at labor cost only	195.00	16.09
1/10/96	Services rendered on 10/17/95, 1 circular white revolving door fixture lens, light fixture maintenance	27.50	2.27
5/1/96	Services rendered on 4/11/96, installation service on handicap ramp (connect power), light fixture maintenance	194.96	16.08

6/25/96	Provided labor to cleanup after construction 1 st and 2 nd floor lobbies, porter: 24 Hrs o/t x \$32.26 hr., janitorial services	774.24	63.87
8/20/96	Overtime services rendered for 7/22/96 3 rd floor, additional time needed to remove trash from all floors to compactor due to SBI engineering working, porter 4 o/t hrs X \$32.26, janitorial services	129.04	10.65
3/5/97	Services rendered on 12/18/96, Ladies room for labor light fixture maintenance	194.96	16.08
7/24/97	Services rendered on 7/2/97 thru 7/5/97, checked entire outside plaza for rat burrows-treated light fixtures after finding burrows-used bate [sic] and tracking powder, exterminating service	425.00	35.06

13. Fourteen percent of petitioner's refund claim relates to its purchases totaling approximately \$1,750,000.00 from Otis Elevator Company for maintenance and repairs to the 39 elevators and 9 escalators which were located at 7 World Trade Center, on which petitioner paid sales tax of \$143,897.95. Otis Elevator Company had a service contract with Silverstein Properties, Inc. to maintain the elevators and escalators at 7 World Trade Center. Petitioner introduced into evidence two exhibits consisting of 223 pages and 64 pages as its Exhibits "8" and "9" which include the same type of documents, all described as "bills from Otis Elevator Company" (tr., p. 217). There are two types of bills. One type is exemplified by a randomly selected invoice, marked as page 211 of Exhibit "8", which is a typical monthly billing for "Service Contract Charges." This representative invoice is dated 11/20/96 and shows a billing to

Silverstein Properties, Inc. for an “amount due on service contract” pursuant to 7 World Trade Center Contract GD 80971A, which was not made a part of the administrative record. It shows “total current charges due” of \$6,225.17 calculated as follows:

Service from 12/01/96 to 12/31/96	6,509.04
Natl account discount- 5.00%	325.45-
Extended term discount- 7.00%	432.85-
Sales tax	474.43
Total current charges due	6,225.17

The second type of bill is exemplified by a randomly selected invoice, marked as page 213 of Exhibit “8”, which is a representative billing for “repairs per service order.” This invoice is dated 12/21/96 and also billed to Silverstein Properties, Inc. for repairs performed on 12/05/96 “per service order #488472, attached machine number 359171.” It shows an invoice amount of \$1,575.32 calculated as follows:

4.5000 hours mech @ 73.81 per hour premium time	332.15
9.0000 hours mech @ 124.79 per hour regular time	1,123.11
Subtotal	1,455.26
Tax	120.06
Invoice Amount	1,575.32

The backup service orders referenced by the repair bills were not included in the Otis Elevator Company documents. In addition, the cost of any parts or equipment used in maintenance or repair was not specifically established or broken out as part of petitioner’s presentation.

14. The remaining 16% of petitioner’s total refund claim is spread among purchases from the following 18 suppliers:

(i) Petitioner paid sales tax in the amount of \$5,939.10 on its purchases from Coyne Electrical Contractors, Inc. of so-called “secondary electrical maintenance.” According to Mr. Weems, petitioner engaged American Power Technology as electrical engineers to troubleshoot the electrical services at 7 World Trade Center on a regular basis. American Power Technology

would then recommend any required maintenance that was necessary to maintain the electrical services in the business. Coyne Electrical Contractors, Inc. would then perform any necessary work. A representative invoice, marked as page 18 of Exhibit “3”, is dated 2/16/95 and shows a billing to Silverstein Properties, Inc. for the following work:

Work ordered by Mr. Charlie McGee & Mr. John D. Mezic, APT [American Power Technology].
Furnished the required labor to work with American Power Technologies and Silverstein Properties, Inc. to remove and replace panel covers and ATS switchgear covers on the 5th and 6th Floors as instructed.

This sample invoice was in the amount of \$864.27 calculated as follows:

Labor: “DBM” Electrician 16hrs @ 49.90 S.T.=	798.40
Material: None.	
Subtotal	798.40
Tax	65.87
Total	\$864.27

Only two invoices of Coyne Electrical Contractors, Inc. included in Exhibit “3” show a charge for materials. However, the invoice dated 12/13/94 does not provide any information concerning the material charge of \$335.00 included in the total invoice amount of \$9,135.04, and the invoice dated 1/4/95 in the amount of \$1,285.00 does not separate labor costs from material costs.

(ii) Petitioner paid sales tax in the amount of \$25,768.48 on its purchases from Elgin Metal and Marble of services involving the periodic inspection of the exterior of 7 World Trade Center to ensure compliance with a New York City local law requiring the maintenance of the exterior facades of buildings. In the course of inspections, any loose exterior panels would be repaired by this vendor. The settlement or creep of the building as well as weather conditions could cause cracking or breaking of the building’s exterior facade. A representative invoice, marked as page 2 of Exhibit “4”, is dated 11/28/94 and shows a billing to Silverstein Properties, Inc. for the following work:

Re: Repaired broken granite facade stones. Location: Drop #8 38th Floor on Washington Street. Two separate Stones;

Scope of work: Removed 2 broken granite pieces. Cleaned and reinstalled using the following method: Pinned with Grade # 316 Stainless-Steel pins, Drilled 2 ½" deep holes every 4 inches along the Granite break, plus surrounding granite panels. Pins are epoxied and Akemi epoxy is applied along the break. Then the crack is patched using the correct color matrix, and then the granite is finished in either polished or flamed finish. Then we caulk entire area.

This sample invoice was in the amount of \$6,413.81 which included a “cost” of \$5,925.00, which was not broken down, plus sales tax of \$488.81. In addition, petitioner purchased the following additional types of services from this vendor as shown by the following representative invoices included in Exhibit “4”:

Invoice Date	Specific description of services performed on invoice	Cost Shown on Invoice	Amount of Sales Tax Paid on Cost Shown
12/13/94	Acid cleaned and repelled 3 rd floor granite lobby floor	\$16,485.00	\$1,360.01
1/24/95	Insulated Port Authority Garage Ceiling	7,500.00	618.75
3/16/95	Repaired loose granite panels on doors. Removed and reinstalled granite panels on two sets of doors on the lobby mezzanine level	2,750.00	226.88
11/29/95	Caulked windows on Drop #13 43 rd floor	3,100.00	255.75
11/27/95	Caulked granite sidewalk on Vesey Street. Grouted granite sidewalk on Vesey Street	7,575.00	624.94

Petitioner also seeks a refund of sales tax paid on its purchases from Elgin Metal and Marble of services to remove ice and snow from a pedestrian bridge that connected 7 World Trade Center across Vesey Street to the main World Trade Center complex of buildings and

outdoor plaza areas. A representative invoice, marked as page 8 of Exhibit "5", is dated 2/28/97 and shows a billing to Silverstein Properties, Inc. for the following work:

Scope of Work:

Provided Labor to constantly remove ice and snow from bridge.

2/07-2/08-2/09-2/10

This sample invoice was in the amount of \$6,273.09 which included a "cost" of \$5,795.00 plus sales tax of \$478.09.

(iii) Petitioner paid sales tax in the amount of \$22,914.28 on its purchases from Fire Service, Inc., for monthly maintenance of its fire alarm systems. Pursuant to an agreement between Silverstein Properties and Fire Service, Inc., with an effective date of February 1, 1994, this vendor agreed "to inspect, clean, service and maintain the equipment hereinafter described periodically on ten days written notice to [Silverstein Properties] and in response to emergency calls at [7 World Trade Center]" The equipment covered by this agreement was detailed in the agreement and ranged from smoke detectors, speakers, phones, strobe panels, elevator recalls, waterflow switches, etc. A representative invoice, marked as page 43 of Exhibit "6", is dated 12/08/95 and shows a billing to Silverstein Properties Inc. in the amount of \$4,990.59 plus sales tax of \$411.72 for "monthly fire alarm maintenance for the period starting 12/01/95." Under the "ship to" section on this invoice, Silverstein Properties Inc. of 7 World Trade Center is referenced, which contrasts with other invoices included in this exhibit which reference Salomon Bros. of 7 World Trade Center. For example, an invoice, marked as page 98 of Exhibit "6", is dated 6/10/97, and although it shows a billing to Silverstein Properties Inc. in the amount of \$2,735.20 plus interest of \$225.65 for "monthly fire alarm maintenance for the period starting 6/1/97," Salomon Bros. is referenced in the "ship to" section of the invoice. A close review of

the agreement between Silverstein Properties and Fire Service, Inc. discloses a “Rider A” which details the following breakdown of the annual charge between Silverstein Properties, Inc. and Salomon Bros. as follows:

Floor 1-27 Inclusive (Silverstein)-

\$59,887.09 Payable Monthly @ 4,999.59 1st year

*\$62,285.92 Payable Monthly @ \$5,190.49 2nd year

Floor 28-Roof (Salomon Brothers)-

\$32,822.39 payable Monthly @ \$2,735.20 1st year

*\$34,131.93 Payable Monthly @ \$2,844.33 2nd year

\$92,709.48 Payable Monthly @ \$7,725.79 1st year

\$96,417.85 Payable Monthly @ \$8,034.82 2nd year

*On 10/1/95-Salomon Bros will take over Fls. 26 & 27 per lease. Their monthly charge will increase proportionately and [Silverstein Properties Inc] monthly charge will decrease proportionately.

Further, although the agreement between Fire Service, Inc. and Silverstein Properties, Inc. provides for this vendor to supply any replacement parts “at Contractors’ existing selling price” with no charge for parts totaling under \$2.00, none of the invoices introduced into evidence show any specific charges for replacement parts.

(iv) Petitioner paid sales tax in the amount of \$1,402.34 on its purchases from the Service Group of The MacKenzie Group, Inc. for maintenance and repairs to the revolving doors located at 7 World Trade Center. It appears that services were also provided, but to a lesser extent, to maintain and repair other doors such as freight entrance doors located at 7 World Trade Center. A representative invoice, marked as page 28 of Exhibit “7”, is dated 2/29/96 and shows a billing to Silverstein Properties 7 WTC in the amount of \$934.46 plus sales tax of \$70.46 for work described as follows:

Plaza level main entrance door #2 & main entrance revolving door @ street level

Work order attached, labor & material to replace closer & bracket on manual door & refasten top cover on header for proper turning of door

Although the referenced work order shows that a mechanic replaced certain parts in performing the above described work, neither the work order nor the invoice itemized material costs. In fact, none of the invoices from this vendor separated out the cost of materials. Further, the invoice dated 5/31/96 for \$1,033.00 plus interest of \$85.22, the largest dollar amount of all of the MacKenzie Group, Inc. invoices, was for the unexplained activity of “cement work for 3rd floor” and made no reference to door repairs or maintenance.

(v) Petitioner paid sales tax in the amount of \$308.55 on plumbing services provided by American Contracting Company. At some unspecified time in the fall of 1995, this vendor, pursuant to a contract in the amount of \$102,300.00, “provided labor, materials, tools and equipment to furnish and install six (6) new drains complete with stainless steel strainers” in a plaza area apparently open to the elements. The invoices for payment under this contract show that no sales tax was collected for such installation. However, at a subsequent time, services became necessary to ensure normal drainage. A representative invoice, marked as page 5 of Exhibit “10”, is dated 6/26/96 and shows a billing to 7 World Trade Center in the amount of \$340.00 plus sales tax of \$28.05 for the following work as described on the invoice:

Re: Plaza drain backing up.

Dispatched men with special electrical equipment; rodded 4" plaza drain located at south west corner of plaza.

Men repeated procedure several times, retrieving a plastic bag from line. Flushed line to ensure normal drainage.

Tested line: Line is clear and water running freely.

Work Performed 6/18/96

(vi) Petitioner paid sales tax in the amount of \$1,128.87 on services provided by H.O. Penn Machinery Company, Inc. for the maintenance and repair of emergency electric generators. The

description of the work performed on the invoices of this vendor are in an unexplained code. For example, the invoice, marked as page 17 of Exhibit “12”, which is dated June 14, 1996 and shows a billing to “Silverstien [sic] Properties” in the amount of \$1,090.00 plus sales tax of \$89.93, describes the work performed as follows:

Special Instructions

Minor PM 3Units

*Gen Set

*Perf Maint

*Flat Rate

Single Sample

Segment 8 Subtotal

This representative invoice billed \$1,090.00 for a quantity designated as 3.0. A review of all of the invoices of this vendor discloses no charges for materials or equipment of any sort.

(vii) Petitioner paid sales tax in the amount of \$4,809.56 on its purchases of replacement air filters for use in 7 World Trade Center’s heating, ventilation and air conditioning (HVAC) system from Engineered Air Filters (EAF Filters, Inc.). A representative invoice, marked as page 16 of Exhibit “13”, is dated 4/4/95 and shows a billing to Silverstein Properties, 7 World Trade Company in the amount of \$5,783.40 plus freight of \$237.56 and sales tax of \$496.73 for the following items:

Quantity shipped of 420	16x25x2 High Eff. Pleat Class I	@Unit price of 9.45
Quantity shipped of 60	16x20x2 same	@Unit price of 7.98
Quantity shipped of 60	16x20x1 same	@Unit price of 7.80
Quantity shipped of 60	15x20x1 same (Spec.)	@Unit price of 14.46

(viii) Petitioner paid sales tax in the amount of \$2,602.05⁶ on services related to the maintenance of the closed circuit television (CCTV) security system located at 7 World Trade Center by Henry Brothers Electronics. At the time in early 1990 when the maintenance contract between Henry Brothers Electronics and Silverstein Properties was executed, all equipment included in petitioner's CCTV security system was "in good working order" in the words of Jim Henry, the president of Henry Brothers Electronics, in his letter dated February 28, 1990 transmitting "a revised contract proposal." Petitioner had provided Mr. Henry with an inventory of all the equipment included in its system including a detailed listing of cctv equipment and so-called "access control equipment." The monthly maintenance fee was initially set at \$1,541.66 plus sales tax. However, it appears that over time this monthly charge was reduced to \$950.00 plus sales tax since this is the amount shown on each of the monthly invoices during the period at issue. A representative invoice, marked as page 39 of Exhibit "14", is dated 12/01/94 and shows a billing to Silverstein Properties in the amount of \$950.00 plus sales tax of \$78.38 for service provided for the period 12/01/94 through 1/1/95. Included in Exhibit "14" is a photocopy of an invoice # 12318, at pages 11 through 15, which itemizes equipment purchased for which sales tax was billed. However, page 10 of Exhibit "14" is a photocopy of the canceled check for payment of this invoice, and this check shows that sales tax was excluded presumably because of the "contractor exempt purchase certificate," marked as page 9 of Exhibit "14".

(ix) Petitioner paid sales tax in the amount of \$4,461.51 for maintenance services on the air conditioning equipment located at 7 World Trade Center provided by Kaback Enterprises, Inc.

⁶ Petitioner claimed that it paid sales tax in the amount of \$3,314.84. However, as noted in this finding of fact, petitioner did not pay sales tax on invoice #12318 included in Exhibit "14". Although the invoice showed sales tax of \$712.79, the canceled check in payment of this invoice did not include sales tax.

A representative invoice, marked as page 18 of Exhibit "15", is dated 3/6/97 and shows a billing to 7 World Trade Co. in the amount of \$3,698.00 plus sales tax of \$305.09 for the following:

For labor services performed/to be performed on your air conditioning system as per our service contract agreement dated 7/2/96.

Period of coverage: 7/2/96 to 7/1/97.

Amount of Contract per year: \$ 14,792.00

Payable in 04 installments(s)

Installment # 04\$3,698.00

One invoice, marked as page 2 of Exhibit "15", separately stated the cost (\$600.00) of materials provided but did not give any description whatsoever of the materials.

(x) Petitioner paid sales tax in the amount of \$ 5,000.00 on maintenance services provided by Johnson Controls, Inc. to the electronic equipment that monitored and controlled the operation of the HVAC system, including the cooling towers, at 7 World Trade Center. A representative invoice, marked as page 31 of Exhibit "16", is dated 9/5/95 and shows a billing to Silverstein Properties, Inc. for service performed at 7 World Trade Center "as per agreement for 9/1/95 thru 11/30/95" in the amount of \$6,973.46 plus sales tax of \$ 575.31. The agreement referenced in this invoice is a "Planned Service Agreement" dated 2/9/95 by petitioner and 2/6/95 by Johnson Controls, Inc. for so-called "premium" services on the "facility management systems" of 7 World Trade Center. A Schedule C included in the agreement provided that this vendor would perform a variety of scheduled maintenance procedures on the following four categories of equipment:

- (i) Computers, central & distributed processors and peripheral controller interface units;
- (ii) Master and remote digital system controllers;
- (iii) Hard copy-keyboard printers;
- (iv) Soft copy-crt's, touchpad and keyboard.

(xi) Petitioner paid sales tax in the amount of \$1,142.24 on preventative maintenance services provided by Reliance Electric Company so as “to minimize down time on your Reliance equipment” in the words of a service agreement dated April 23, 1996. The Reliance equipment to be maintained regulates the speed of fans in 7 World Trade Center’s HVAC system. A representative invoice, marked as page 14 of Exhibit “17”, is dated 1/7/97 and shows a billing to Silverstein Properties pursuant to the service agreement in the amount of \$1,998.75 plus sales tax of \$164.90. This invoice represents “a prorated quarterly billing as described in your service agreement for the months January February March.”

(xii) Petitioner paid sales tax in the amount of \$24,873.98 on services provided by Remco Maintenance Corporation to clean, repair, or refinish metal surfaces such as elevator cabs and doors and various other mirror finished stainless steel surfaces inside and outside 7 World Trade Center, which are described in detail in a “metal maintenance” service agreement dated November 25, 1987 by Silverstein Properties, Inc. A representative invoice, marked as page 35 of Exhibit “18”, is dated 2/1/97 and shows a billing to Silverstein Properties, Inc. for services per “maintenance contract (me⁷)” in the amount of \$9,986.00 plus sales tax of \$823.85.

(xiii) Petitioner paid sales tax in the amount of \$9,652.50 on various painting services provided by The White Bear Co., Inc. The invoices, in general,⁸ do not itemize the cost of the paint, spackle, and other tangible personal property purchased versus the services provided. A representative invoice, marked as page 6 of Exhibit “19”, is dated October 3, 1995 and shows a

⁷ Unexplained code word, presumably “me” stands for “metal.”

⁸ One invoice marked as page “8” of Exhibit “19” did, in fact, separately itemize the cost of “five (5) gallons BM paint-leave in building as per your instruction” as \$146.65 out of a subtotal of \$3,296.65. This appears to have been an out-of-the-ordinary situation.

billing to Silverstein Properties in the amount of \$5,975.00 plus sales tax of \$492.93 for the following with reference to the “loading dock interior”:

properly prepared and painted ceiling, columns and overhead doors. Color and finished to match existing. (Work completed on overtime)

An invoice dated December 5, 1994 in the amount of \$36,954.00 indicates work performed on the premises rented by the Internal Revenue Service. However, this invoice, like all the others, is billed to Silverstein Properties and was paid by Silverstein Properties.

(xiv) Petitioner paid sales tax in the amount of \$958.87 for the rental of a 32-foot motor driven scaffold provided by American Scaffold Parts. The scaffold was used by unspecified personnel to clean the windows of 7 World Trade Center and was described by Mr. Weems as “basically a window washing rig” (tr., p. 257). A representative invoice, marked as page 19 of Exhibit “20”, is dated 10/16/96 and shows a billing to Silverstein Properties in the amount of \$770.00 plus sales tax of \$63.53 for the rental period of 11/12/96 to 12/9/96. The cost to initially install the scaffold, which would be rented for just under one year, was separately billed and amounted to a cost of \$2,152.00 plus sales tax.

(xv) As noted in Finding of Fact “12”, approximately 70% of petitioner’s refund claim relates to its purchases from Ogden Allied Services, Inc. of so-called “general cleaning services.” In addition, petitioner purchased similar cleaning services from ABM Co. Petitioner paid sales tax in the amount of \$43,557.88 for such general cleaning services including window washing, which it claims should be refunded. A small part of such sales tax was paid for cleaning services performed on tenant space occupied by the United States Secret Service. However, the billing for such services, like all the billings of this vendor, was to Silverstein Properties, Inc. as purchaser of the services.

(xvi) Petitioner paid sales tax in the amount of \$441.59 for maintenance services performed on electric meters by Sheldon Electric Co. to ensure that the meters, used to monitor the electric usage of the building's tenants, functioned properly. A representative invoice, marked as page 2 of Exhibit "23", is dated 11/1/95 and shows a billing to Silverstein Properties, Inc. for the following items:

- 1) Assisted T.S.I. (Meter Co.) With Testing Meter for American Express, Saloman [sic] Brothers, Richardson Greenshields, Hartford Fire, and I.S.O.
- 2) Work included opening Panel and Switch Covers and Tracing Circuits with Pazer.

An invoice dated 2/2/95 in the amount of \$394.20 plus sales tax of \$32.52 indicates work performed on meters for the United States Secret Service. However, this invoice, like all the others, is billed to Silverstein Properties and was paid by Silverstein Properties. Further, the invoices refer to the total charge as a charge for "total labor and material" despite the fact that no material costs are referenced in any of the invoices, except for one dated 12/14/94 which failed to separately state a charge for the "new floor modular (sensor #88)" which was replaced.

(xvii) Petitioner paid sales tax in the amount of \$103.54 on the installation of "an isolated ground outlet for the new submeter system" performed by Walsh Electrical Contracting, Inc. The invoice dated June 26, 1996 separately stated a material cost of \$135.00 distinct from an installation cost of \$1,120.00. The backup "job invoice" details the materials as follows:

20' EMT
450' 12 [indecipherable] wire
2 20 amp ISO outlets
1- 20 ITE bolt in brochure
Miscellaneous [sic]

The backup job invoice also noted the labor incurred of "2 men 7 hrs."

(xviii) Petitioner paid sales tax in the amount of \$411.43 on services and materials provided by American Power Technologies, Inc. pursuant to a proposal dated January 17, 1995 accepted by Silverstein Properties, Inc. for this vendor “to provide engineering services during 1995 in connection with the maintenance and operation of the high voltage and network electrical systems at 7 World Trade Center.” The three invoices at issue were for (i) technical direction by this vendor for the shutdown and then restart of an electrical feeder, (ii) preparation of a written report by the vendor’s engineers for parts replacement, repairs and maintenance of the building’s electrical systems, and (iii) purchases of various fuses and parts.

SUMMARY OF THE PARTIES’ POSITIONS

15. Petitioner maintains that to impose sales tax on its purchases of services and materials to operate, repair and maintain 7 World Trade Center during the period at issue, which was the property of the Port Authority, “hinders the public purpose for which the [Port Authority] was created” (Petitioner’s brief, p. 9). Pointing to the exemption from the imposition of sales tax under Tax Law § 1116(a)(1) for the Port Authority’s purchases, petitioner argues that it also should be entitled to have made its purchases for the services and materials at issue free of sales tax. In the alternative, petitioner contends that its purchases were exempt from the imposition of sales tax under Tax Law § 1115(15) and (16) “on the basis that they consisted of tangible personal property sold to it for use in adding to, altering or improving or maintaining, servicing or repairing the real property of an [exempt] organization . . .” (Petitioner’s brief, p. 26). Petitioner also argues that “a portion of its purchases consisted of capital improvements” and were exempt from sales tax under Tax Law § 1101(b)(9) (Petitioner’s brief, p. 26). Finally, petitioner makes an argument that if the “end result” of services purchased by petitioner “is a

capital improvement, or the service is rendered in a tax exempt situation, the service is not subject to tax” (Petitioner’s brief, pp. 30-31).

16. The Division counters that petitioner’s purchases were not exempt from sales tax under Tax Law § 1116(a)(1) because it was not an agent of the Port Authority, and the lease agreement between petitioner and the Port Authority “establishes that no agency relationship existed” (Division’s brief, p. 10). The Division also contends that petitioner’s purchases of various *services* were not exempt from sales tax under Tax Law § 1115(a)(15) and (16) because only purchases of *tangible personal property* that became an integral component part of 7 WTC would be exempt under these provisions. Finally, the Division maintains that petitioner has failed to show that any of its purchases were for installation of capital improvements.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) provides for the imposition of sales tax upon the “receipts from every sale of tangible personal property. . . .” At Tax Law § 1105(c)(3), sales tax is also imposed upon the receipts from every sale of the service of “[m]aintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business” and at section 1105(c)(5) upon the receipts from every sale of the service of “maintaining, servicing or repairing real property”

B. Petitioner’s primary contention focuses on the right of the Port Authority to make all of its purchases of goods and services free from the imposition of sales and use taxes. This exemption from tax for the Port Authority’s purchases is codified at Tax Law § 1116(a)(1), which provides that purchases of New York State agencies, instrumentalities, public corporations and political subdivisions are exempt from sales and use taxes. The Division

concedes that the Port Authority, as a public corporation created by compact between New York and New Jersey, is entitled to this exemption.

C. It is well established that the purchases made by a contractor pursuant to an *agency* relationship with an exempt organization would be exempt from the imposition of sales tax. In effect, the exemption provided by Tax Law § 1116(a)(1) to the exempt organization would flow through to the contractor purchasing goods and services as the *agent* of the exempt organization (*see, Matter of West Valley Nuclear Services Co., Inc.*, Tax Appeals Tribunal, November 13, 1998, *confirmed* 264 AD2d 101, 706 NYS2d 259, *lv denied* 95 NY2d 760, 714 NYS2d 710; *Matter of The Pioneer Group*, Tax Appeals Tribunal, February 8, 1990). In the matter at hand, it is concluded that the evidence does not support a conclusion that petitioner, or more accurately its related entity, Silverstein Properties, Inc., made its purchases of the goods and services at issue as an *agent* of the Port Authority. Most important, the lease terms, cited in relevant detail in Finding of Fact “2”, establish that petitioner, not the Port Authority, was the sole party financially liable for construction, alteration, maintenance and repair of 7 World Trade Center (*cf., Matter of MGK Constructors*, Tax Appeals Tribunal, March 5, 1992; *Matter of Fagliarone, Grimaldi & Associates*, Tax Appeals Tribunal, May 4, 1989, *confirmed* 167 AD2d 767, 563 NYS2d 324). There is no language in the lease that created an agency relationship between the Port Authority and petitioner. While title or ownership of the building and all fixtures resided in the Port Authority, under the lease, only petitioner bore the cost of construction, alteration and maintenance of the office building. Furthermore, not one of the hundreds of invoices introduced by petitioner at the hearing indicates that petitioner, or its related entity, Silverstein Properties, Inc., acted as agent for the Port Authority in purchasing the goods and services at issue. Neither do any of the hundreds of canceled checks introduced by

petitioner at the hearing indicate that payment was made on behalf of the Port Authority or that petitioner, or its related entity, was acting as the agent of the Port Authority.

D. Petitioner's argument that requiring it to pay sales tax on its purchases results in an increase in its "Gross Expense" thereby reducing the "Annual Percentage Rental" it pays to the Port Authority does not alter the fact that the exemption at issue is limited to the tax exempt entity itself or its agent as discussed above. There is nothing in the Tax Law to justify expanding the exemption to a long term lessee of a tax exempt entity that owns the underlying real property. Petitioner's attempt to expand this exemption in this fashion arguably doesn't even meet the minimum test of *plausibility* (*cf., Custom Shop Fifth Ave. v. Tax Appeals Tribunal*, 195 AD2d 702, 600 NYS2d 295 [wherein the Court upheld the Tribunal's rational interpretation of a statutory provision noting that a taxpayer must show not only that its interpretation of law is plausible but also that it is the only reasonable construction available])).

E. Tax Law § 1105(c)(5) imposes sales tax upon the receipts from every sale of the service of "maintaining, servicing or repairing real property" Similarly, Tax Law § 1105(c)(3) imposes sales tax upon the receipts from every sale of the service of "[m]aintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business" 20 NYCRR 527.7(a)(1) provides that the maintaining, servicing or repairing of real property covers "all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition." In addition, 20 NYCRR 527.7(a)(3) provides that the price of tangible personal property, such as paint, for example, is also subject to tax "[w]hen the service of maintaining, servicing or repairing real property is performed in conjunction with the transfer of title to tangible personal property."

F. As noted in Finding of Fact “12”, approximately 70% of petitioner’s refund claim relates to its purchases from Ogden Allied Services, Inc. of so-called “general cleaning services.” Petitioner properly paid sales tax on these services under the above statutory and regulatory language detailed in Conclusion of Law “E”. The cleaning services were clearly taxable as the servicing of real property under Tax Law § 1105(c)(5) since they clearly, in the regulatory language, “relate to keeping real property in a condition of fitness” This conclusion is reinforced by the decision of the Tax Appeals Tribunal in ***Matter of SSOV ‘81 LTD*** (January 19, 1995) which provides a clear methodology for determining what activities constitute a taxable service. The Tribunal noted:

In order to determine a service’s taxability, the analysis employed by the New York courts and the Tax Appeals Tribunal focuses on the service *in its entirety*, as opposed to reviewing the service by components (Emphasis added.)

Accordingly, petitioner’s reliance on Tax Law § 1115(a)(15) and (16) is misplaced because it ignores the primary function of the cleaning services and the clear taxability of the cleaning services under Tax Law § 1105(c)(5). The specific statutory language justifying the imposition of sales tax on cleaning services must prevail over petitioner’s expansive and implausible reading of a statutory exemption not on point (*cf, Robert Bruce McLane Associates v. Urbach*, 232 AD2d 826, 649 NYS2d 487). The provisions relied upon by petitioner exempt from the imposition of sales tax a contractor’s purchase of *tangible personal property* used in “erecting” (under subdivision “15”) or “in maintaining, servicing or repairing real property” (under subdivision “16”) so long as the tangible personal property becomes “an integral component part of [the real property].” These provisions simply do not exempt from tax the purchase of *services* or *supplies* used in performing such services, which clearly related to petitioner’s own operation of a first-class office building in which it leased space to third parties. Further, the

invoices from the cleaning vendor (as well as those of the other vendors) failed to separate out and specifically identify the cost of materials used in the particular service. It has been long established that if a single charge includes taxable and nontaxable components, the entire charge is taxable (*see, LaCascade v. State Tax Commission*, 91 AD2d 784, 458 NYS2d 80; *Matter of Hydronic Fabrications, Inc.*, Tax Appeals Tribunal, December 1, 1988). Moreover, petitioner did not prove that any such materials became a “component part” of the real property within the meaning of the exemption at Tax Law § 1115(16) as opposed to being merely items used in the performance of a service (*cf., Matter of N.A.E., Inc.*, Tax Appeals Tribunal, March 16, 1995). A similar analysis can be applied to the other purchases of goods and services detailed in Findings of Fact “13” and “14”. In fact, the only purchase that might plausibly be considered the purchase of tangible personal property, used in maintaining, servicing or repairing real property and which became an integral component part of the real property, is detailed in subparagraph “viii” of Finding of Fact “14”. However, although the invoice #12318 of Henry Brothers Electronics itemized equipment purchased for which sales tax was billed, the photocopy of the canceled check in payment of this invoice shows no sales tax was actually paid. Consequently, it is concluded that petitioner properly paid sales tax on the purchases at issue under either Tax Law § 1105(c)(5) or Tax Law § 1105(c)(3).

G. Petitioner’s contention that some of the purchases at issue should have been exempt from the imposition of sales tax on the basis that they constituted capital improvements is also rejected. Tax Law § 1105(c)(3)(iii) excepts from the sales tax imposed by said paragraph (3) receipts from the services of installing tangible personal property “which, when installed, will constitute a capital improvement to real property, property or land” “Capital Improvement” for purposes of subparagraph (iii) is defined in Tax Law § 1101(b)(9) as follows:

Capital improvement. An addition or alteration to real property which:

- (i) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
- (ii) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
- (iii) Is intended to become a permanent installation.

Each of these three separately numbered requirements must be met in order for an addition or alteration to qualify as a capital improvement and thus not be subject to sales tax (*see, Matter of Howard Johnson Co.*, Tax Appeals Tribunal, July 19, 1990, *confirmed* 174 AD2d 805, 570 NYS2d 741, *lv denied* 78 NY2d 863, 578 NYS2d 877). Petitioner has failed to establish that any of its purchases of the services and goods at issue met these requirements.⁹

H. As noted in Finding of Fact “7”, the auditor allowed a refund of sales tax in the amount of \$18,990.59 on some purchases of tangible personal property which he treated as having been incorporated into the structure of 7 World Trade Center and of \$16,681.91 on some purchases of services which he determined were for the installation of tangible personal property which became capital improvements upon installation. Petitioner argues that similar types of purchases, for which it has now produced invoices and proof of payment, should also be treated as exempt from tax. This argument is rejected since the auditor’s interpretation of the law is not controlling. In the course of the give and take of his audit of a million dollar refund claim, the auditor might have chosen to apply the law in a less restrictive fashion in light of the very limited number of invoices offered by petitioner so that the cost of applying a generous, but incorrect, interpretation was minimal. The Tribunal has determined that a taxpayer may introduce at hearing documents which it failed to produce in the course of an audit (*see, Matter of Airport*

⁹ No sales tax was paid on petitioner’s purchase of the six drains installed by American Contracting Company, as detailed in subparagraph “v” of Finding of Fact “14”, which appears to have been the only capital improvement included in the purchases at issue.

Industrial Park, Tax Appeals Tribunal, April 11, 1991). Consequently, petitioner was properly permitted to present its documents for the first time at this late stage, despite earlier requests for production by the Division which it apparently ignored. Nonetheless, it is acceptable for the Division, now faced with a great number of invoices, to vigorously contest petitioner's positions, and it may not be estopped from taking a position that might be viewed as varying from the auditor's (*cf.*, **Matter of Maximilian Fur Co., Inc.**, Tax Appeals Tribunal, August 9, 1990). In any event, the legal interpretation of the auditor is not binding on the Division of Tax Appeals.

I. Finally, since petitioner or, more exactly, its related entity was the actual purchaser of the services at issue, it is irrelevant that the services were performed on the tenant space of governmental entities like the Secret Service or the I.R.S. (*see*, **Matter of West Valley Nuclear Services Co., Inc., supra**). As noted in subparagraph "xiii" of Finding of Fact "14", for example, the painting vendor, The White Bear Co., Inc. performed services on the premises rented by the Internal Revenue Service from petitioner. The invoice for such services, like all the others, is billed to Silverstein Properties and was paid by Silverstein Properties.

J. The petition of 7 World Trade Center, L.P. is denied, and the partial allowance of its refund claim dated August 14, 1998, except as modified by the Conciliation Order dated July 23, 1999, is sustained.

DATED: Troy, New York
October 4, 2001

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE